Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	§	
	§	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	§	CC Docket No. 92-115
	§	
	§	
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Service	§	CC Docket No. 94-46 RM 8367
	§	
	§	
	§	
	§	
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service	§	CC Docket No. 93-116
	§	
	§	
	§	

PETITION FOR RECONSIDERATION AND CLARIFICATION

SOUTHWESTERN BELL
MOBILE SYSTEMS, INC.

Wayne Watts
Vice President and General Attorney
Bruce E. Beard
Attorney
17330 Preston Rd
Suite 100A
Dallas, TX 75252
(214) 733-2000

ATTORNEYS FOR SOUTHWESTERN
BELL MOBILE SYSTEMS, INC.

December 19, 1994

TABLE OF CONTENTS

SUMMARY ..... (ii)

I. THE COMMISSION SHOULD NOT PRESUMPTIVELY PRECLUDE BELL COMPANIES FROM SELLING OR PROMOTING AN AFFILIATE'S CELLULAR SERVICE 2

II. THE COMMISSION SHOULD CLARIFY WHAT IS MEANT BY A TOWER FOR PURPOSES OF SECTION 22.371 8

III. THE COMMISSION SHOULD CLARIFY THAT ALTERNATIVE ENGINEERING CANNOT BE USED TO CLAIM CGSA IN ANOTHER MARKET OR UNSERVED AREA 9

IV. THE COMMISSION SHOULD RESOLVE THE INCONSISTENCIES BETWEEN THE RULES AND FCC FORM 600 10

V. THE COMMISSION SHOULD ACKNOWLEDGE THAT CO-LICENSING IS ACCEPTABLE AND STATE THE APPLICABLE FORM TO BE USED 11

VI. THE COMMISSION SHOULD CLARIFY THAT THE SYSTEM INFORMATION UPDATES MAY SHOW MODIFICATIONS PENDING BEFORE THE COMMISSION 12

VII. THE COMMISSION NEEDS TO CLARIFY WHETHER A MINOR MODIFICATION SHOULD BE FILED ON A FORM 600 OR FORM 489 AND STATE APPROPRIATE OPERATION DATE 12

CONCLUSION 13

SUMMARY

The Commission should be commended for its work in revising the Part 22 Rules. The work represents a vast undertaking. SBMS believes that certain revisions and deletions made were inadvertent or taken without a full appreciation of the consequences which is to be expected in such a vast undertaking.

The Commission needs to revise the separation of prior Section 22.901(d)(1) to eliminate the provisions prohibiting all Bell Company affiliates from selling or promoting service of the cellular affiliate. Bell Company affiliates should be allowed to sell and promote cellular service on "a compensatory, arms length basis". The rules promulgated in the Joint Cost Order Proceedings and the various safeguards adopted since 1983 satisfy concerns about cross-subsidization. To absolutely preclude such sales is inconsistent with other positions taken by the Commission.

The Commission should also revise the mandatory notification and measuring requirements for towers near AM broadcast stations to impose a minimum height requirement of 60 feet above ground level. The Commission should also clarify that alternative engineering cannot be used to claim CGSA in another carrier's market or unserved area. The Commission also needs to resolve inconsistencies between the rules and Form 600 and clarify the proper form to be used for minor modifications. The Commission should also revise the rules to again recognize multiple licensed cells (co-licensing) and identify the appropriate form to be used. The Commission should also clarify that System Information Updates may show modifications pending before the Commission but not yet granted.

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PETITION FOR RECONSIDERATION AND CLARIFICATION

Southwestern Bell Mobile Systems, Inc. requests the Commission to reconsider and clarify certain aspects of the revision of the Part 22 Rules adopted in the Commission's Report and Order in this combined proceeding.[1] The Report and Order admittedly revised Part 22 in its entirety.[2] In doing so the Commission noted that its purpose included eliminating outdated and unnecessary information collection requirements, expediting authorization of service, promoting efficient use of the spectrum, ensuring consistency due to rule changes since the last major rewrite in 1983, changing rules that have become obsolete and unnecessary and updating technical specifications.[3] The revision

[1]Report and Order, Released September 9, 1994.

[2]Report and Order, para. 1.

[3]Report and Order, paras. 1-2.

represents a vast undertaking by the Commission and the industry and the Commission should be commended on its effort. SBMS believes however that there are certain revisions and deletions made in this vast undertaking that were inadvertent or taken without a full appreciation of the consequences. Thus, SBMS requests clarification or reconsideration of various issues.

I. THE COMMISSION SHOULD NOT PRESUMPTIVELY PRECLUDE BELL COMPANIES FROM SELLING OR PROMOTING AN AFFILIATE'S CELLULAR SERVICE.

Prior to the Part 22 revision, Section 22.901 Eligibility stated that cellular service being provided by a Bell Company was required to be through a separate corporation and in 22.901 (d)(1) specifically provided that any Bell Company which is a "carrier":

> Shall not engage in the sale or promotion of cellular services on behalf of the separate corporation or sell, lease or otherwise make available to the separate corporation any transmission facilities which are used in the provision of its landline telephone services, **except on a compensatory, arms length basis**; this section shall not prohibit joint advertising or promotional efforts by the landline carrier and its cellular affiliate.[4]

Without discussing the reasoning in either the Notice of Proposed Rulemaking or the Report and Order in this proceeding, Subsection 22.901(d)(1) was separated into two separate subsections. The separation materially changes the effect of the Section by failing to include the "**except on a compensatory, arms length basis**" language in both subsections and by changing the application from Bell Companies which are carriers to **all Bell Company affiliates**. The revised subsections, located in Section 22.903 of the revised rules now provide that:

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[4] 22 CFR 22.901(d)(1). (emphasis added)

(a) Access to landline facilities. BOCs must not sell, lease or otherwise make available to the separate corporation any transmission facilities that are used in any way for the provision of its land line telephone service, except on a compensatory, arms length basis.

.....

(f) Promotion. BOCs must not engage in the sale or promotion of cellular service on behalf of the separate corporation. However, this does not prohibit joint advertising or promotional efforts by the landline carrier and its cellular affiliate.[5]

BOC is defined as the regional Bell Holding Companies, their successors in interest and affiliated entities. Thus, under the revised rules all Bell Company affiliates are absolutely prohibited from selling or promoting the cellular service of the cellular affiliate, even on a "compensatory, arms-length basis". Such an absolute prohibition is unwarranted, outdated and directly contrary to other actions taken by this Commission.

Precluding Bell Companies from promoting or selling the service of their cellular affiliate is a giant step in the wrong direction. Since the last major revision of the Part 22 rules in 1983 safeguards have been adopted which support the continuation of such activities, not their elimination.

a. The Affiliate Transaction Rules and Associated Safeguards Eliminate Concerns about Cross-Subsidization.

[5] Proposed 22 CFR 22.903. Report and Order, Appendix B-72.

In the Joint Cost Order[6] proceeding this Commission and the industry conducted an in depth examination and debate over issues regarding cross-subsidization between affiliates and cross-subsidization between regulated and non-regulated operations. Through the Joint Cost Proceeding the Commission promulgated the current cost allocation rules[7] and affiliate transaction rules[8]. The rules prevent cross-subsidization and ensure that affiliate transactions are on compensatory, arms length basis by mandating how the various costs may be reflected on the telephone company books. In addition, the Commission has adopted a broad spectrum of rules, audits and reporting requirements which effectively control affiliate transactions including:

1. Requirements to file and update quarterly, cost allocation manuals (CAM) reflecting the established rules and current affiliate and nonregulated transactions.[9]

2. CAM uniformity aimed at facilitating FCC review of local exchange carrier CAMs to ensure they are reasonable and adequate.[10]

3. External audits, which include affiliate transactions in their scope, that:
   a) provide the same level of assurance as that provided on a financial statement audit;

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[6]Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities and Amendment of Part 31, the Uniform System of Accounts for Class a and Class B Telephone Companies to provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and their Affiliates, CC Docket 86-111, 2 FCC Rcd 1298 (1988) (Joint Cost Order); recon. 2 FCC Rcd 6283 (1987) (Joint Cost Recon. Order); Further Recon. 3 FCC Rcd 6701 (1988).

[7]47 CFR 32.23, 64.901, 64.903, 64.904.

[8]47 CFR 32.27, 64.902.

[9]47 CFR 64.903.

[10]See, In the Matter of Implementation of Further Cost Allocation Manual Uniformity, AAD 92-42, Order Inviting Comments (1992); Memorandum Opinion and Order (Released July 1, 1993).

b) render an opinion on whether the carriers cost allocation methodologies are conforming with the CAM

c) render an opinion on whether the results fairly present the results of the company's operations and;

d) evaluate and report on the carrier's external controls when the auditors rely upon those controls in determining the extent of auditing procedures as required by Generally Accepted Accounting Principles (GAAP).[11]

4. The establishment of detailed and automated reporting requirements through the Automated Reporting Management Information System (ARMIS).[12]

5. Performance of on-site audits by FCC staff.

The affiliate transaction and cost allocation rules have been in place and affirmed through numerous Commission orders and actual use for over seven years. The current affiliate transaction rules and safeguards against cross-subsidization were deemed adequate by this Commission in 1987,[13] refined in the various CAM approval orders through 1988,[14] and reaffirmed as working well in 1991 in the CI-III Remand Proceedings.[15]

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[11]In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd. 7571, 7591-7597 (1991).

[12]See, ARMIS 43-02 Table B-3-Investment in Affiliates and Other Companies; Table B-4-Analysis of Assets Purchased From or Sold to Affiliates; Table I-2 Analysis of Services Purchased From or Sold to Affiliates. ARMIS 43-03-Annual Report of telephone company revenues, income and expenses directly assigned, attributed or generally allocated to regulated and non-regulated and the amounts of each category subject to separations.

[13]Joint Cost Order, 2 FCC Rcd at 1335-1337. Joint Cost Recon. Order, 2 FCC Rcd at 6293-6298.

[14]The Common Carrier Bureau reviewed and issued Orders on each cost allocation manual filed.

[15]In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571, 7591 - 7597 (1991).

The affiliate transaction rules and safeguards are sufficient to protect against any concerns regarding cross-subsidization. The affiliate transaction rules were relied on in the past as demonstrating the "compensatory, arms-length basis" required under Section 22.901 for customer referrals from Southwestern Bell Telephone Company (SWBT) to Southwestern Bell Mobile Systems. In addressing the issue, when reviewing and approving the SWBT Cost Allocation Manual (CAM), the FCC Common Carrier Bureau noted that SWBT's CAM listed that the standard fee for such service exceeded the fully distributed cost of providing the service and noted that SWBT should indicate that the cost being exceeded is for all referrals, not just successful referrals.[16]

The affiliate transaction and cost allocation rules were also relied on by this Commission less than four months ago as an adequate protection against cross-subsidization concerns arising out of the AT&T/McCaw Cellular merger. In approving the merger the Commission noted that the Joint Cost Proceeding resulted in "a comprehensive set of rules to assure that a carrier's regulated operations do not cross-subsidize its nonregulated activity".[17]

The affiliate transaction and cost allocation rules adopted in the Joint Cost Proceeding and the various safeguards discussed above have been implemented since the last major revision of Part 22 and support the continuation of the sale or promotion of cellular service by an affiliate on a "compensatory, arms-length basis". The Commission should clarify that failure to include the "except

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[16]In the Matter of Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, para. 20, AAD 7-1694 (Released April 10, 1989).

[17]In re Applications of Craig O. McCaw, Transferor and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc., Enf. 93-44, Memorandum and Opinion, paras. 116, fn. 260, (Released September 19, 1994). ("McCaw/AT&T Merger Approval Order")

on a compensatory, arms length basis" language from 22.903(e) was an oversight or reconsider its decision not to include such language in subsection 22.903(e). The Commission should also clarify that subsection (e) is only applicable to Bell Companies which are carriers not all affiliated Bell Companies.

b. Prohibiting Bell Companies from Selling or Promoting Cellular Service of an Affiliate is Inconsistent with Other Commission Positions.

An absolute prohibition on the sale or promotion of cellular service by any Bell Company on behalf of its cellular affiliate is inconsistent with positions taken by this Commission regarding commercial mobile radio service and cellular, in particular. The Commission recognizes and acknowledges an obligation to implement the congressional intent of creating regulatory symmetry among similar mobile services as prescribed by the Omnibus Budget Reconciliation Act of 1993.[18] The Commission also exults the benefits of "one-stop shopping" brought about by the AT&T/McCaw merger and the Commission's decision to allow not only joint-selling but the bundling of services by AT&T/McCaw.[19] Yet, despite the presumed customer benefits of one stop shopping and despite the acknowledged goal of regulatory symmetry among mobile services, revised subsection 22.903(d) absolutely prohibits the Bell Companies from selling cellular service through any other entity than the separate cellular affiliate. The absolute prohibition applicable only to Bell Company cellular service is contrary to the Commission's actions in the McCaw/AT&T Merger Approval Order, the CMRS Rules Order and the congressional intent underlying the changes to the

[18]In the Matter of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN 93-252, Second Report and Order, para. 2 (Released March 7, 1994). (CMRS Rules Order).

[19]McCaw/AT&T Merger Approval Order, paras. 57, 83.

Communications Act contained in the Omnibus Budget Reconciliation Act. The Commission should reinsert the "except on a compensatory, arms length basis" language in subsection 22.903(e).

II. THE COMMISSION SHOULD CLARIFY WHAT IS MEANT BY A TOWER FOR PURPOSES OF SECTION 22.371.

Section 22.371 of the revised rules imposes notification and measurement obligations on a public mobile service licensee constructing or modifying a "tower" within 1 kilometer of a non-directional AM broadcast station or within 3 kilometers of a directional AM broadcast station. The intent of Section 22.371 is to make the licensees constructing or modifying towers responsible for installing and maintaining any detuning apparatus necessary to correct any disturbance caused by the tower to the pre-existing AM station radiation pattern.[20]

The problem with the proposed rule is that it is all inclusive. It does not define "tower" and thus seemingly imposes the obligation on the mobile service licensee regardless of whether the antenna and structure supporting it could ever interfere with the broadcast station. Antennas for mobile service may be placed on any number of structures including buildings, smoke stacks, water towers, telephone poles and other such structures which are pre-existing and not currently causing interference. The rule is not clear whether these various structures would be considered "towers" for the purpose of Section 22.371.

SBMS suggests that instead of attempting to define "tower" by structure type that Commission should adopt a height criteria which would trigger the mandatory notification and measurements obligations. The height criteria should be set at 60 feet above ground level (AGL) as

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[20]Report and Order, Appendix A-25.

explained on Exhibit 1.[21] Any structure on which cellular antennas are placed which is less than 60 feet AGL should be exempt from the notification requirements. In addition, notification and measurements should not be required when the overall height of an existing structure is not increased. For example, the placement of an antenna on a building which is over 60 feet AGL should not trigger the obligations if the antenna does not increase the overall height of the structure. In addition, the placement of an antenna on an existing 60+ foot tower which does not increase the overall height of the tower should be exempt.

III. THE COMMISSION SHOULD CLARIFY THAT ALTERNATIVE ENGINEERING CANNOT BE USED TO CLAIM CGSA IN ANOTHER MARKET OR UNSERVED AREA.

Subsection 22.911(b) allows alternative engineering to be used to determine cellular geographic service area (CGSA) if the carrier believes that the normal method contained in Subsection 22.911(a) produces a CGSA which departs significantly from the service area where reliable cellular service is actually provided. The normal method of determining CGSA contained in Subsection 22.911(a) however specifically excludes from the resulting CGSA any area outside of the cellular market boundary, except as provided for in 22.911(c) and any area within the CGSA of another cellular system. The alternative engineering method of determining CGSA contained in 22.911(b) however does not contain a similar exclusion of any area outside of the carrier's cellular market or area contained within the CGSA of another cellular system from its determination of CGSA. A carrier should not be allowed to gain CGSA outside of its market merely by choosing the alternative engineering method contained in 22.911(b). The Commission should expressly exclude any area outside the cellular market boundary, except as provided for in 22.911(c), and any area

[21] See Affidavit of John R. Furr, attached hereto as Exhibit I.

within the CGSA of another cellular system from the alternative CGSA determination described in 22.911(b).

IV. THE COMMISSION SHOULD RESOLVE THE INCONSISTENCIES BETWEEN THE RULES AND FCC FORM 600.

FCC Form 600 has replaced FCC Form 401 referenced in the revised rules. There are several inconsistencies however between the information required by the rules and the information required on FCC Form 600. The Commission should resolve the inconsistencies to achieve uniformity in reporting and to avoid confusion.

a. 22.929(b)(1)

Revised Subsection 22.929(b)(1) adds a requirement to provide information regarding the "proximity to adjacent market boundaries and international borders" to be reported on Form 600, Schedule C. Form 600, Schedule C however does not require such information. The term "proximity" is undefined and the Detailed Discussion of the Part 22 Rule Amendments does not discuss why the information is being required. Such information is unnecessary given the strictly defined cellular markets. The Commission should delete the phrase "proximity to adjacent market boundaries and international borders" from Subsection 22.929(b)(1).

b. 22.901(d)

Previously, Subsection 22.930(b) required cellular licensees to inform the Commission of any new technologies or new services to be provided 30 days prior to the implementation of the service. Revised Subsection 22.901(d) allows cellular carriers to use new technologies and provide auxiliary services but does not require prior notification to the Commission. Presumably, notification

is no longer required. If this is not correct, the Commission needs to expressly state that notification is required.

c. 22.929(b)(2)

Subsection 22.929(b)(2) provides that the technical information required on FCC Form 600 Schedule C is to include the type of antenna used. Form 600 Schedule C however does not request the type of antenna. The type of antenna used is important in determining the Effective Radiated Power (ERP) of the facility and in confirming service area boundary. The Commission should revise Form 600 Schedule C to include the type of antenna.

V. THE COMMISSION SHOULD ACKNOWLEDGE THAT CO-LICENSING IS ACCEPTABLE AND STATE THE APPLICABLE FORM TO BE USED.

Prior to the revision of the rules Subsection 22.903(e) specifically provided for multiple licensed cells i.e. a single cell used to serve multiple markets. The rules provided however that the cell could not be used for determining CGSA for a different MSA, RSA or unserved area unless the cell was licensed for both markets. Section 22.903 has been revised and is now basically contained in 22.911 and 22.912, however there is no provision for multiple licensed cells. No reason is given as to why the language allowing multiple licensed cells was deleted. Multiple licensed cells contributed to the efficient and economical provision of service and should be retained. The Commission should revise its rules by reinserting the language of prior Subsection 22.903(e). The Commission should also state the appropriate form to be used for multiple licensed cells.

VI. THE COMMISSION SHOULD CLARIFY THAT THE SYSTEM INFORMATION UPDATES MAY SHOW MODIFICATIONS PENDING BEFORE THE COMMISSION.

The previous rules provided that the System Information Update (SIU) maps should "depict any proposed modifications pending before the Commission which have not been granted prior to the date which the licensee files its system information update".[22] The revised rules do not address the inclusion of proposed modifications pending but not granted at the time of the filing of the SIU.[23] The Commission needs to clarify that the inclusion of proposed modifications pending but not granted should be included in the SIU. The revised rule recognizes that changes will occur after the filing of the SIU but before the end of the five year build out period.[24] It is more efficient to allow licensees to include anticipated changes based on pending modifications in the SIU filing than to require the licensee to file the updated data when the modification is made. SBMS requests that the Commission again specifically allow licensees to include on the SIU proposed modifications pending before the Commission by including such language in 22.947(c).

VII. THE COMMISSION NEEDS TO CLARIFY WHETHER A MINOR MODIFICATION SHOULD BE FILED ON A FORM 600 OR FORM 489 AND STATE THE APPROPRIATE OPERATION DATE.

The Commission needs to clarify which form is required for a minor modification and reaffirm the date operation may commence. The revised rules state that minor modifications may be made without obtaining prior Commission approval and that notification of any minor modifications

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[22]47 CFR 22.925.

[23]Report and Order, Appendix B-84, 22.947(c).

[24]Id.

must be filed no later than 15 days after the modification is made.[25] The fee table however indicates both FCC Form 489 and Form 600 as the proper form to be filed for minor modifications.[26] There is no indication in either the revised rules or the discussion of the revisions regarding when Form 600 is to be used as compared to when Form 489 is to be used. Previously, a Form 489 was used.[27] The Commission needs to clarify which Form is appropriate. In addition, if the Commission desires a Form 600 to be filed it should clarify that the Form is required to be filed "no later than 15 days after the modification is made" to be consistent with the revised rules.[28]

CONCLUSION

For reasons stated the Part 22 Rules and Form 600 should be modified or clarified as stated herein.

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[25]Report and Order, Appendix B-25, 22.163.

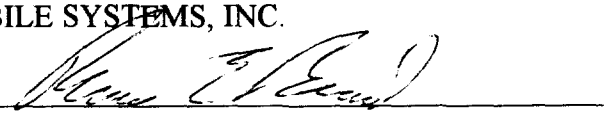
[26]Report and Order, Appendix B-2, 1.1105.

[27]47 CFR 22.9(d).

[28]Report and Order, Appendix B-25, 22.163. This would also be consistent with the instructions to Form 600 which provide that if the box for a minor modification is checked the filing will not be listed in a Public Notice, unless it appears the classification is incorrect. (Instructions, p. 3, Item 18.)

Respectfully submitted,

SOUTHWESTERN BELL
MOBILE SYSTEMS, INC.

By: 

Wayne Watts
Vice President and General Attorney
Bruce E. Beard
Attorney
17330 Preston Rd
Suite 100A
Dallas, TX 75252
(214) 733-2000

ATTORNEYS FOR SOUTHWESTERN
BELL MOBILE SYSTEMS, INC.

December 19, 1994

EXHIBIT 1

AFFIDAVIT OF JOHN R. FURR

STATE OF TEXAS

COUNTY OF BEXAR

John R. Furr being duly sworn, deposes and says:

1. My name is John R. Furr. I am a graduate of Stephen F. Austin State University in Nacogdoches, TX, in 1966 with a BA degree. Also in 1966 I earned a FCC First Class Radiotelephone Operator License. I hold a currently valid FCC General Radiotelephone Operator License, PG-9-6899, Second Class Radio Telegraph Operator's Certificate, T2-HQ-11192, and Amateur Extra Class License, K5MF.

2. I am a member of the Society of Broadcast Engineers (SBE) since 1968. I was SBE Certified Senior Broadcast Engineer, 1977 and Certified Professional Broadcast Engineer (CPBE), 1988. I have been the Chairman for SBE Texas Steering Committee since 1990. I am an associate member of the Association of Federal Communications Consulting Engineers (AFCCE) since 1985. I am an associate member of the Texas Association of Broadcasters (TAB). I was a member of IEEE 1983-1991.

3. I have worked in a technical capacity in Radio-TV since 1962. For eleven years I was technical director for broadcast chain, Clear Channel Communications, Inc., as in-house communications consultant and chain technical supervisor. I prepared FCC filings for AM, FM, TV, LPTV, MMDS, RPU, and microwave. While with "Clear" I was a member of the following National Association of Broadcasters (NAB) committees: FM Transmission Subcommittee 1987-1988, NRSC AM Standards Committee 1987-1988, Radio Advisory Board 1981-1988, and Engineering Program Committee 1988-1989. I have presented three technical papers at NAB conventions.

4. I am president of John Furr & Associates, Inc. which first began as Diversified Broadcast Engineering, Inc. in 1983, providing communications consulting services. I write all of the computer programs used by the company and use-licensed most of the programs to eight other engineering communications consultants.

5. I am partner in SATTEL Technologia Avazanda, SA de CV in Mexico City, Mexico, providing communication and computer services in Mexico. I am a partner in radio stations KRIO-FM, operating in San Antonio, Texas.

6. I was the Texas State Chairman for the Emergency Broadcast System (EBS) 1987-1993. I was Member of the San Antonio College (SAC) Advisory Board 1982-1983 and a member of SAC Mass Media Advisory, 1993. I have been an Engineering Program Advisor for the TAB from 1980 until present and chaired engineering programs in 1980 and 1984. I was technical

council for the New Jersey Class A Broadcasters Association 1987-1988 as author of a successful petition for FM Class A stations power increase. I am author of "Furr Proposal" in 1991 to resolve EMI issues between FCC and FAA.

7. In my opinion, the minimal height requirement for mandatory notification and measuring to determine whether the construction or modification of a tower will affect an AM station antenna pattern should be 60 feet above ground level. Structures below that height should be exempt from the mandatory notification and measurement requirements of revised Section 22.371.

8. The 60 foot height requirement is based on the physics of the Standard (AM) medium wave propagation theories. Heights of less than 1/8 wave (0.125 wave) have such high losses that re-radiation effects are minimal as supported by C.F.R. 73.190, Figure 8, Curve A.

The formula for calculating the minimal height of a structure in feet is:

983.6 [speed of light] / f (MHz) [frequency] = feet [full wave]
feet [full wave] / wave fraction = feet [fraction wave]

Therefore:

983.6 / 1.7 [maximum frequency] / 8 [1/8 wave] = 72 feet

Note: 60 feet = 0.104 wave. The 60 foot height thus is less than 1/8 wave of any Standard (AM) station, including the newly expanded band to 1700 KHz.

9. In my work I have had occasions to analyze structures not exceeding 60 feet in height found in the proximity of AM stations and have never found an instance where these structures have caused AM pattern warping. I have seen electrical transmission towers of taller heights do so, but not structures of 60 feet or less.

John R. Furr

Subscribed and sworn to before me this 15th day of December, 1994.

Notary Public

YOLANDA ZEPEDA
MY COMMISSION EXPIRES
August 15, 1997